IN RE TERRA INDUSTRIES, INC. SHAREHOLDER LITIGATION	:	IN THE
	:	CIRCUIT COURT
	:	FOR BALTIMORE CITY
	:	Case No. 24-C-10-001302

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MEMORANDUM OPINION

This is a class action shareholder suit arising out of circumstances surrounding the acquisition of Defendant Terra Industries, Inc.[1] Plaintiffs Michael Clark, Donald Gold, and Bridget Harris own shares of Terra Industries, Inc. common stock, and brought this action on behalf of themselves and all other shareholders of the company, pursuant to Md. Rule 2-231. Defendants are Terra Industries, Inc. (hereinafter "Terra") and eleven members of Terra's Board of Directors (hereinafter the "individual defendants"). The case is before the Court on Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment. A hearing on both motions was held on June 16, 2010. For the reasons that follow, Defendants' Motion will be granted, and Plaintiffs' Motion will be denied.

[1] This case is the consolidation of Michael Clark, et al. v. Henry Slack, et al., case no. 24-C-10-001302 and Bridget Harris, et al. v. Terra Industries, et al., case no. 24-C-10-001642. Pursuant to a consolidation order signed on April 19, 1010, the cases were consolidated under case no. 24-C-10-001302, and captioned In re Terra Industries Shareholder Litigation.

CF Industries Initial Efforts to Acquire Terra

Terra was a leading producer and marketer of nitrogen products, incorporated in Maryland and headquartered in Sioux City, Iowa. Beginning in January of 2009, CF Industries, a Terra competitor, made a series of unsolicited bids in an attempt to take over Terra. CF's first unsolicited bid for Terra, which was announced on January 15, 2009, proposed that CF would acquire all of the outstanding shares of Terra common stock at a fixed exchange ratio of 0.4235 CF shares for each Terra common share. The cash value of the offer was approximately $20.00 per share; during December of 2008, Terra's stock traded between approximately $12.00 and $17.00 per share. The January 2009 proposal valued Terra at $2.1 billion. That bid was rejected by the Terra Board as inadequate. CF continued to make unsolicited bids for Terra throughout 2009, all of which were rejected by Terra's Board. On November 1, 2009, CF announced another offer of $32.00 in cash and 0.1034 of a share of CF stock for each Terra share. The November offer had a value of $40.61 per share, based upon CF's most recent closing price, but that value included a $7.50 cash dividend payment that Terra had announced in October of 2009, to be paid December 11, 2009. Thus, the net value of that proposal was $33.11 per share.

On September 28, 2009, as part of its effort to acquire Terra, CF purchased approximately 7% of Terra's stock on the open market, and nominated a slate of three to the Terra Board. At the November 2009 annual meeting, CF's three nominees were successfully elected as Terra directors. On December 4, 2009, CF

made another offer, which consisted of $36.75 in cash and 0.1034 of a share of CF per share of Terra. The December offer also included the $7.50 cash dividend and had a net value of $38.41 per Terra share. During discussions with Terra representatives about that offer, CF representatives stated that this proposal was CF's "all in value" and that it had at most "nickels and quarters" left to offer. The December offer was unanimously rejected on December 13, 2009, by Terra's Board, which by then included the three directors who had been nominated by CF. On December 15, 2009, CF issued a press release announcing that it would allow financing commitments for an acquisition of Terra to expire on December 31, 2009.

On January 4, 2009, CF representatives contacted Terra representatives to request information that was reviewed by the Terra Board in connection with it's decision to reject CF's December 2009 offer. A few days later, Terra declined to provide CF with the information. According to a CF press release issued several months later, the admissibility of which is challenged by Defendants, Defendants also told CF in January that Terra was not for sale. On January 14, 2010, CF announced that it had withdrawn its offer to acquire Terra and was no longer pursuing the acquisition.

Yara Efforts to Acquire Terra

Throughout 2009, while CF was making bids for acquisition of Terra, representatives of Terra were also gauging other potential interests in acquiring Terra. As early as June of 2008, Yara International ASA ("Yara") had indicated an interest in acquiring Terra, but there was no meaningful follow up until the January

2009 announcement of CF's initial acquisition bid. At that time, Yara contacted the CEO of Terra, Michael Bennett, to indicate its continued interest in Terra. Throughout 2009, Terra's CEO also engaged in conversations with the CEOs of several other companies, to measure their interest in an acquisition of Terra, and signed confidentiality agreements with two of those companies.

At meetings between Yara officials and Terra's CEO on November 3, 2009 and December 1, 2009, Yara continued to indicate its interest in acquiring Terra. On December 17, 2009, after Terra rejected the December CF bid, Terra and Yara executed a confidentiality agreement, which was subsequently amended on February 6, 2010. On January 8, 2010, Yara informed Terra that it would negotiate with Terra, provided that Terra commit to negotiate exclusively with Yara for thirty days and maintain absolute confidentiality during the exclusivity period.[2]

On February 15, 2010, Terra issued a press release announcing an agreement with Yara, pursuant to which Yara would acquire all the outstanding shares of Terra common stock for $41.10 per share. Terra's Board unanimously approved the Yara merger, which was valued at approximately $4.1 billion. Terra's Board prepared a draft proxy statement recommending that shareholders approve the merger. The Yara merger agreement contained a "no-shop" provision and a provision for a $123 million termination fee if either party breached the agreement.

[2] This was during the same time period that Terra refused to provide CF with information on why it had rejected CF's December proposal and the same time period that Terra allegedly told CF that Terra was not for sale.

CF Makes the Winning Bid

On March 2, 2010, following the announcement of the merger between Yara and Terra, CF announced an offer to acquire Terra for $37.15 in cash and 0.0953 of a share of CF stock for each share of Terra. In its press release announcing the offer, CF stated that the offer had a total value of $47.40 per share based upon CF's closing price on March 1, 2010. Terra's Board unanimously voted to accept CF's offer and terminate the Yara agreement, subject to Yara's right to match or beat the CF offer. Yara declined to match the CF offer, and on March 11, 2010, the Terra Board voted unanimously to approve the CF merger agreement and recommend it to Terra stockholders. On March 12, 2010, Terra notified Yara and CF of its decision and executed the CF merger agreement. Terra and CF issued a joint press release announcing the merger. CF paid the $123 million termination fee to Yara on behalf of Terra.

The Lawsuits

Immediately after the announcement of the Yara merger, two putative Class Action Complaints – one on February 19, 2010 and one on February 22, 2010 – were filed in the District Court of Iowa for Woodberry County against Terra, it's directors and some of its officers, Yara, and Yukon Merger Sub, Inc.[3] The two Maryland cases that were consolidated to form the instant action were filed on February 22, 2010 and March 1, 2010. All four cases were filed before the CF

[3] Yukon Merger Sub, Inc., a Maryland Corporation, was created as a wholly owned subsidiary of Yara in order to acquire Terra.

winning bid and the initial complaints in each alleged that the consideration received by stockholders in connection with the Yara merger was inadequate, that the individual defendants breached fiduciary duties by approving the merger, and that Terra aided and abetted them in doing so. Plaintiffs in the Maryland actions alleged that Yara was the "favored merger partner" and that the provisions of the Yara merger agreement "impose[d] an excessive and disproportionate impediment to the Board's ability to entertain any other potentially superior alternative offer." The Maryland Complaints also alleged that the Yara deal was "lock[ed] up" and "all but ensure[d] that no competing offer will be forthcoming." Plaintiff Harris called the Yara merger a "*fait accompli*" that would "ensure no competing offers will emerge for the Company."

On March 11, 2010, Plaintiffs in the first filed Maryland action filed a Motion for an Ex Parte Temporary Restraining Order and/or Preliminary Injunction, seeking to prohibit CF from paying the Yara termination fee.[4] That motion was withdrawn on March 12, 2010, after the Terra Board voted to accept the CF offer. Also on March 11, 2010, Amended Class Action Complaints were filed in the two Maryland cases. On March 30, 2010, after the cases were consolidated,[5] Plaintiffs filed an Amended Consolidated Complaint with two counts, one for breach of fiduciary duty and one for attorneys' fees.

[4]On the same day, a Motion for a Temporary Injunction Prohibiting Payment of Termination Fee was filed in one of the Iowa District Court cases.

[5] An order consolidating the cases was granted on March 23, 2010 but not filed until April 18, 2010.

Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment

Plaintiffs filed their Motion for Partial Summary Judgment at the same time that they filed the Amended Consolidated Complaint. On April 19, 2010, Defendants filed their Motion to Dismiss, or in the Alternative, for Summary Judgment. Defendants argue that they are entitled to dismissal or summary judgment for four reasons. First, Defendants assert that Plaintiffs have failed to state a claim for breach of fiduciary duty. Second, Defendants argue that even if Plaintiffs' allegations could support a claim for breach of fiduciary duty, Terra's corporate charter exculpates the individual defendants from damages liability. Third, Defendant Terra argues that the claim against it for breach of fiduciary duty is invalid because it did not owe any fiduciary duty to its stockholders. Fourth, Defendants argue that Plaintiffs' claim for attorneys fees must be dismissed because it is not a permissible stand alone claim. The crux of Plaintiffs' Motion for Partial Summary Judgment is that Defendants breached their fiduciary duty to maximize shareholder value. Because this is the reverse of Defendants' argument and is the same as Plaintiffs' response to Defendants' motion, it is not separately discussed.

Md. Rule 2-322(c) provides, in relevant part, that, "If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501." With respect to the Motion to Dismiss

Count I against the individual defendants, the Court has considered evidence outside of the complaint; therefore with respect to that claim, the motion is treated as a motion for summary judgment. As to the claim against Terra and Count II, the motion is treated as a motion to dismiss because only the complaint has been considered.

In considering a motion for summary judgment, "the court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "The threshold issue in a proper motion for summary judgment, therefore, is whether a significant factual dispute exists." *Warner v. German*, 100 Md. App. 512, 516 (1994). "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *King v. Bankerd*, 303 Md. 98, 111 (1985). "Moreover, factual disputes, and the inferences reasonably to be drawn from the facts, are resolved in favor of the party opposing summary judgment and against the moving party." *Rite Aid Corp. v. Hagley*, 374 Md. 665, 684 (2003).

The Exculpatory Clause in Terra's Charter Precludes a Damage Claim Against the Individual Defendants.

Defendants argue that even if they did breach their fiduciary duties to Plaintiffs, they are not liable for damages due to the operation of the exculpatory clause in Terra's charter. Plaintiffs argue that the exculpatory clause does not immunize the defendants from damages because it is inapplicable to circumstances involving a change of control transaction, and that even if it did apply, it does not

immunize the individual defendants because Plaintiffs have pled facts demonstrating that Defendants engaged in active and deliberate dishonesty that is material to Plaintiffs' claims. Alternatively, Plaintiffs argue that, at most, the exculpatory clause provides an affirmative defense that Defendants may rely upon at trial. As explained below, the exculpatory clause is applicable, Plaintiffs have not pled facts of active and deliberate dishonesty, and the exculpatory clause may form the basis for granting a motion for summary judgment.

Terra's charter contains a provision which provides:

> To the fullest extent permitted by statutory or decisional law. . . no director or officer of the Corporation shall be personally liable to the Corporation or its stockholders for money damages.

Section 2-405.2 of the Corporations and Associations Article of the Maryland Code provides that "the charter of a corporation may include any provision expanding or limiting the liability of its directors and officers to the corporation or its stockholders as described under §5-418 of the Courts and Judicial Proceedings Article." Section 5-418(a) of the Courts and Judicial Proceedings Article of the Maryland Code provides

> The charter, . . . , of a Maryland corporation may include any provision expanding or limiting the liability of its directors and officers to the corporation or its stockholders for money damages, but may not include any provision that restricts or limits the liability of its directors or officers to the corporation or its stockholders:
>
> > (2) To the extent that a judgment or other final adjudication adverse to the person is

> entered in a proceeding based on a finding in the proceeding that the person's action, or failure to act, was the result of active and deliberate dishonesty and was material to the cause of action adjudicated in the proceeding; . . . .[6]

Defendants argue that Plaintiffs have not alleged or come forward with any evidence that the individual defendants actions fall into the exception, and therefore, the exculpatory clause protects them Plaintiffs' claim for damages.

In support of their argument that the exculpatory clause provision does not apply to actions of directors in a sale of the company, Plaintiffs rely on Section 1-102 of the Corporations and Associations Article and *Shenker v. Laureate Education, Inc.*, 411 Md. 317, 338-339 (2009). Section 1-102 provides that "the provisions of this article apply to every Maryland corporation and to all their *corporate acts*," (emphasis added). Plaintiffs argue that the directors were not engaged in a "corporate act" because "a board that undertakes to negotiate the price its shareholders will receive for their property after making a decision that their company is indeed for sale is not engaged in *corporate acts that pertain to the management of the company.*" Thus Plaintiffs equate "corporate acts" with "acts that pertain to the management of the company."

In support of their argument Plaintiffs direct the Court's attention to the following language in *Shenker*:

[6]Subsection (1) prohibits exculpation "To the extent that it is proved that the person actually received an improper benefit or profit in money, property, or services for the amount of the benefit or profit in money, property, or services actually received." There is no allegation that any of the Defendants received an improper benefit or profit, and Plaintiffs do not rely

on this exception.

> It is without question that [Corps. & Assocs.] § 2-405.1(a) governs the duty of care owed by directors when they undertake managerial decisions on behalf of the corporation. When directors undertake to negotiate a price that shareholders will receive in the context of a cash-out merger transaction, however, they assume a different role than solely 'managing the business and affairs of the corporation.' Duties concerning the management of the corporation's affairs change after the decision is made to sell the corporation . . . Beyond that point, in negotiating a share price that shareholders will receive in a cash-out merger, directors act as fiduciaries on behalf of the shareholders.

411 Md. at 338-339 (internal citations omitted). While this language makes clear that directors engaged in merger negotiations are not engaged in *corporate managerial duties*, neither it, nor any other language in *Shenker* indicates or suggests that the sale or merger of a corporation and acts related thereto are not *corporate acts*, as contemplated by §1-102 of the Corporations and Associations Article.

In fact, not only does the cited language not support Plaintiffs' argument, there is language in *Shenker* that supports the opposite conclusion. In holding that §2-405.1 does not bar direct shareholder suits, the *Shenker* Court compared the language of §2-405.1(g) with the language of §2-405.2. The Court pointed to the language of §2-405.1(g) that provides that "[n]othing in this section creates a duty of any director of a corporation enforceable otherwise than by the corporation or in the right of the corporation," and concluded that the language "plainly means that, to the extent §2-405.1 creates duties on directors . . . , those duties are enforceable only by the corporation or through a shareholders' derivative action." 411 Md. at 348. In

further support of that conclusion, the Court emphasized that there is no language in subsection g that bars a direct shareholder suit "against directors based on duties created other than [those created] by § 2-405.1." The Court then contrasted that to the language in §2-405.2 which *does* contain language limiting directors' liability to shareholders:

> The language of the statute [§ 2-405.1 (g)] makes no mention of barring direct shareholder actions against directors based on duties created other than by *§2-405.1*, such as the fiduciary duties of candor and maximization of shareholder value discussed *infra. See § 2-405.2* ("The charter of the corporation may include any provision expanding or limiting the liability of its directors and officers to the corporation *or its stockholders* . . .") (emphasis added).

Id. at 348-49 (emphasis in original).

As the Court reiterated in *Shenker,* "[t]he cardinal rule of statutory interpretation is to ascertain and carry out the true intention of the Legislature," *Id*. at 347 (citations omitted), and a court begins that process by looking at the "language of the statute itself" and giving the words "their ordinary and natural significance." *Id.* at 348 (citations omitted). A "statute is to be read so that no word, phrase, clause, or sentence is rendered meaningless." *Id*. (*citing Reichs Ford Rd. Joint Venture v. State Rds. Comm'n of the State Highway Admin.*, 388 Md. 500 (2005)). Nothing in the language of Sections 1-102 or 2-504.2 supports Plaintiffs' argument. This Court agrees with Defendants that §1-102 is expansive; it applies to "*every Maryland* corporation," and to "*all* their corporate acts". The sale of a company is a fundamental corporate act. The merger agreement is an agreement between two corporations, Terra and Yara.

Moreover, the impetus for the statute providing for an exculpatory clause was a decision by the Delaware Supreme Court, *Smith v. Van Gorkom*, 488 A. 2d 858 (Del. 1985), that imposed personal liability on directors in a sale-of-control context. James J. Hanks, Jr. and Larry P. Scriggins, *Let Stockholders Decide: The Origins of the Maryland Director and Officer Liability Statute of 1988*, 18 U. Balt. L. Rev. 235-37 (1988). Thus the very circumstance to which Plaintiffs' argue the statute does not apply was a reason for the creation of the statute.

In sum, while Plaintiffs are correct that *Shenker* identifies different duties and responsibilities related to merger negotiations as compared to duties owed in relation to corporate *managerial* acts, this Court has found no support for Plaintiffs' notion that a corporate merger, and the actions of directors related thereto, are not *corporate* acts. Therefore, the exculpatory clause of Terra's charter applies to the individual defendants decision to sell the company.

Plaintiffs' argument that they have pled facts demonstrating that Defendants engaged in active and deliberate dishonesty that is material to the claims in the Complaint is equally unavailing. Plaintiffs allege that Defendants falsely told CF that Terra was "not for sale" at the same time that Plaintiffs were negotiating a sale to Yara, and that this deliberately dishonest statement caused CF to stop pursuing Terra. Plaintiffs' argue that the purpose of this deliberate dishonesty was to stave off a disfavored bidder and that the statement resulted in a suppression, rather than a maximization, of shareholder value. Defendants respond that the statement proffered by Plaintiffs is not admissible, and even if it is admitted, it was not

dishonest and did not suppress shareholder value.

Plaintiffs rely on a press release issued by CF on March 2, 2010. The press release contained a letter from CF to the Terra Board also dated March 2, 2010, in which CF stated that it had been advised by Terra in early January that "Terra is not for sale." The letter further stated that following that statement, CF withdrew its offer. Defendants correctly argue that the letter is inadmissible hearsay. Plaintiffs assert that the statement is admissible under the business records exception in Rule 5-803(b)(6), which provides, in part:

> A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness.

The CF letter and accompanying press release are dated March 2, 2010 and refer to statements and events that allegedly occurred in January of 2010. Thus, the statement was not "made at or near the time" of the event. Md. Rule 5-803(b)(6)(A). If the inadmissibility of the CF statement were Plaintiffs' only hurdle, the Court would allow Plaintiffs the opportunity to conduct discovery. Even if the statement were admissible, however, it does not prove or even permit an inference of material

dishonesty.

In the context of a large acquisition transaction, a statement that a company is "not for sale" is too vague and general to constitute fraud or material dishonesty. *See Marathon Ptnrs. L.P. v. M&F Worldwide Corp.*, 2004 Del. Ch. LEXIS 101, *22 (Del. Ch. July 30, 2004) ("A statement by a director of a company to a potential acquirer that the president and CEO of the company said the 'company is not for sale at any price' reasonably might be interpreted as an invitation for the potential acquiror to put their cards on the table."); *In re Toys R Us Shareholder Litigation*, 877 A.2d 975, 1007 (Del. Ch. 2005)(Players in American mergers and acquisition markets "have no problem with rejection. The great cases of the last quarter century . . . all involved bidders who were prepared, for financial advantage, to make hostile, unsolicited bids."). It is clear that CF understood the statement as an invitation to increase its bid. On January 14, 2010, in a press release issued contemporaneously with the withdrawal of its offer to acquire Terra, CF stated:

> It is clear that an acquisition of Terra now *would require a significant increase in our offer*. . . ." *** "While the strategic merits of a transaction are undeniable, it is not in the best interests of CF Industries stockholders to *increase our offer to the level that we believe now would be required* for Terra to agree to an acquisition.

(Emphasis added).[7] Thus, any statement to CF that Terra was "not for sale" was heard by CF as an invitation to increase its bid. Furthermore, in the press release announcing its rejection of the CF December offer, the Terra Board stated that it

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[7]Other exhibits suggest that the statement was made as part of a discussion between the

would "continue to consider any bona fide opportunity that creates meaningful value for all Terra shareholders." Therefore, any statement to CF that Terra was not for sale, was a permissible negotiation strategy, not a dishonest statement and certainly is not "material" to Plaintiffs' cause of action.

Finally, Plaintiffs argument that the exculpatory clause, at most, provides an affirmative defense to be used by Defendants at trial fails. Plaintiffs argue that because the statute provides that an exculpatory clause does not immunize a defendant from damages "[t]o the extent that a *judgment* or other *final adjudication*" is "based on a *finding*" of dishonesty by a defendant, the provision cannot be the basis for a motion for summary judgment or dismissal. In support of their argument, Plaintiffs cite *In re Emerging Communs., Inc. S'Holders Litig*., 2004 Del. Ch. LEXIS 70 (Del. Ch. 2004). That case provides no support to Plaintiffs. In that case, after a trial, the trial court found that some of the directors were not exculpated and in the course of its decision stated:

> [W]here an interested merger is found to be unfair and the corporation's charter has [an] exculpatory provision, this Court must then proceed to "identify the breach or breaches of fiduciary duty upon which liability [for damages] will be predicated in the *ratio decidendi* of its determination that entire fairness has not been established." That is, "when entire fairness is the applicable standard of judicial review, a determination that the director defendants are exculpated from paying monetary damages can be made only *after the basis* for their liability has been decided."

Id. at 103. (citations and footnotes omitted) (emphasis in original). There is nothing

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bankers for the two corporations, not by Defendants.

in that language that supports Plaintiffs' argument that a determination of the applicability of an exculpatory clause cannot be made at the summary judgment stage. Here, there is no evidence that the merger was interested or unfair.

Plaintiffs Have Not Alleged Sufficient Facts to Show That Defendants Breached Their Fiduciary Duties.

Defendants also argue that even absent the exculpatory clause, Plaintiffs have failed to state a claim for breach of fiduciary duty. Initially, Defendants argue that Maryland does not recognize a standalone claim for breach of fiduciary duty. While it is true that in *Kann v. Kann*, 344 Md. 689, 693 (Md. 1997), the Court stated that "allegations of breach of fiduciary duty, *in and of themselves*, do not give rise to *an omnibus or generic cause of action at law* that is assertable against all fiduciaries. . . ," the *Kann* Court went on to state that while there is no "no universal or omnibus tort for the redress of breach of fiduciary duty [,] . . . [t]his does not mean that there is no claim or cause of action available for breach of fiduciary duty." *Id*. at 713.

> Our holding means that identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion. Counsel are required to identify the particular fiduciary relationship involved, identify how it was breached, consider the remedies available, and select those remedies appropriate to the client's problem.

Id. It is now clear that "in a cash-out merger transaction, where the decision to sell a corporation has already been made, shareholders may pursue direct claims against directors for breach of their fiduciary duties. . . ." *Shenker*, 411 Md. at 342.[8] However, as discussed below, Defendants are correct that Plaintiffs' claim for breach of fiduciary duty in this case fails.

"When directors undertake to negotiate a price that shareholders will receive in the context of a cash out merger transaction, . . . , they assume a different role than solely 'managing the business and affairs of the company,'" *Id.* at 338, and "owe their shareholders common law duties of candor and good faith efforts to maximize shareholder value. . . ." *Id.* at 335-336. That standard, which was derived from *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986)*, requires directors to act reasonably in obtaining maximum value for shareholders and provides for enhanced judicial review of directors' actions in the context of an acquisition as compared with day to day management of the company. *Id.* The enhanced judicial review is not, however, a license for courts to "second guess reasonable, but debatable, tactical choices that directors have made in good

[8] Defendants' reliance on this Court's language in *Duty Free Americas, Inc. v. Legg Mason Wood Walker, Inc.*, 2005 MDBT 1 (Md. Cir. Ct. 2005) is therefore misplaced.

faith." *In re Toys R Us Shareholder Litigation*, 877 A.2d 975, 1000 (Del. Ch. 2005). Rather, a court's task is "to examine whether the directors have undertaken reasonable efforts to fulfill their obligations to secure the best available price, and not to determine whether the directors have performed flawlessly.'" *Id.* at 1001 (*quoting In re Pennaco Energy, Inc.*¸787 A.2d, 691, 705 (Del. Ch. 2001)). "At the root of a judicial inquiry into whether a board met its *Revlon* duties is whether the board acted *reasonably*." *In re the MONY Group, Inc. Shareholder Litigation*, 852 A.2d 9, 26 (Del. Ch. 2004) (emphasis in original).

Plaintiffs assert that Defendants breached their *Revlon* duties in several ways, but the initial focus in their complaint and their memoranda, was that Defendants breached their fiduciary duties because the dollar value of CF's December 2009 offer was higher than the February 2010 Yara offer that the Board accepted. In the Consolidated Class Action Complaint, which was filed on March 30, 2010, Plaintiffs alleged:

- [O]ne analyst considered the [Terra Board's] acceptance of the Yara bid as "damage control" because [Terra] got a better price from CF.
- Despite the attractiveness of the [December 2009 CF] offer, ***which would have granted the Terra shareholders $4.81 more than the Proposed Yara Transaction***. . .
- Terra's refusal to consider the offer from CF and to accept Yara's reduced offer only two months later. . .
- It made little sense [for the Terra Board] to reject an offer yielding nearly $46 per share as not providing "meaningful value," only to accept a competing offer for only $41.10 per share shortly thereafter . . .

(emphasis in original). Plaintiffs continued those assertions in their Motion for Partial Summary Judgment and their Opposition to Defendants Motion to Dismiss or in the Alternative for Summary Judgment. In their Motion for Summary Judgment, Plaintiffs stated:

- "CF Industries' final unsolicited proposal to purchase Terra in 2009 *** was worth $45.91," and the Yara offer that the Board accepted, "was $4.81 per share ***less*** than CF Industries' December 2009 bid."
- When the Terra Board accepted the Yara bid, the Board "was well aware . . . [of] the superior offer made in December 2009 by CF."
- "CF Industries had made what would be deemed a Superior Proposal ***prior*** to the Yara Offer. . . . "
- "CF Industries had repeatedly expressed interest in purchasing the Company on terms more advantageous to shareholders than those offered by the Yara Transaction;"
- "[t]he CF Offer was a Superior Proposal under the terms of the Merger Agreement;"
- "[t]he Yara Transaction was inferior to the CF Offer."

(Emphasis in original.) In their Opposition to Defendants' Motion, Plaintiffs stated:

- "CF had notified Terra that it had a continuing interest in acquiring [Terra] on terms more advantageous to shareholders than those offered by the Yara Transaction"
- At the time Terra accepted the Yara bid, Defendants knew that "CF was anxious to make an offer to acquire Terra shares for more than $45.91 per share, or at least $481 million more than Yara was willing to pay."

It is charitable to say that Plaintiffs' valuation of the December 7, 2009 CF offer in all of these statements is inaccurate. Plaintiffs have always known that the $45.91 per share does not take into account that any cash payment pursuant to the

CF offer would have included the $7.50 special dividend payment to be distributed to shareholders regardless of the CF offer. As Plaintiffs knew when they made their allegations, the December 2009 offer had a value of $38.41 per share, net of the $7.50 Terra dividend. It is clear even from CF's Press Release, at the time of the offer, that the offer included the $7.50 dividend and was "$36.75 per share in cash (*$29.25 net of the $7.50 dividend*), plus 0.1034 of a share of CF industries common stock." (emphasis added). The Yara offer accepted by the Board in February of 2010, following the payment of the dividend, was $41.10 per share. Thus, the only CF offer that was higher than the Yara offer was CF's final offer of $47.40, which was accepted by the Terra Board in March of 2010.

At oral argument, Plaintiffs began to back away from their claim that the CF December offer was valued at $45.91 per share and said that earlier assertions to that effect were not a "core claim" or central to their case. However, based solely on a statement that CF made in its March 2, 2010 letter to Terra and accompanying press release, Plaintiffs persisted in arguing that the value of the December CF offer was higher than the value of the Yara offer that Terra accepted. As it made its winning bid, CF stated,

> we do not understand how Terra could have accepted an offer from Yara with a risk adjusted present value that we believe was not higher than the offer CF Industries had made in December 2009. The value of any offer from Yara must be discounted for the lengthy period to closing, as well as the risk that numerous conditions beyond Terra's control would not be satisfied, including regulatory, legislative, and stockholder approvals.

It can safely be said that this statement of opinion made by CF, in the midst of its efforts to outbid Yara, is not evidence that the December CF offer had a higher value than the Yara offer. Plaintiffs have proffered no other evidence that the December CF offer was higher than the Yara offer. In short, there is simply no basis for the claim that the Board members breached their fiduciary duties by agreeing to a lower price from Yara than had been offered by CF in December.

Plaintiffs also complain that the *process* that the Board chose was flawed and resulted in a price that did not maximize shareholder value. In support of their complaint about the sale process, Plaintiffs argue that Defendants "agreed to unfair deal protection provisions, including a no-solicitation provision, a standstill provision, a matching provision, and a massive $123 million termination fee . . ." With respect to the termination fee, in their Complaint and memoranda, Plaintiffs' key argument is that if CF had not paid the termination fee, "Terra would have been more valuable to CF, and CF would have bid at least $123 million more for the Company. . . ," resulting in a greater value for the shareholders. At the oral argument, Plaintiffs went further and argued that by definition any termination fee, no matter the amount,

is a breach of Defendants fiduciary duties.[9]

Plaintiffs argument that the termination fee was too high or that a termination fee at any amount was prohibited, is totally baseless. Termination fees are regularly used deal protection devices and are not presumptively inappropriate. *See McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000) (footnote omitted)("Nor do the rather ordinary 'deal protection' provisions of the merger agreement provide any support for the plaintiffs' *Revlon* claims. Putting aside the lack of any motive for the board to negotiate preclusive lock-ups, the termination fee and no-shop contained in the XL merger agreement are not out of keeping with those which have been upheld by Delaware courts."). Termination fees are usually analyzed as a percentage of the deal. *See In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 120 (Del. Ch. 2007). A 3% fee, the percentage of the Yara and Terra deal that the fee represented in this case, is not unreasonable. *Id. See also In re Pennaco Energy, Inc. Shareholders Litig.*, 787 A.2d 691, 707 (Del. Ch. 2001) ("The plaintiffs' attack on the termination fee's level is make-weight and at odds with precedent upholding the validity of fees at this level."); *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 177 (Del. Ch. 2007) (A "modest termination fee" of 3% was not "shown to be in any way coercive or preclusive."); *In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9, 24 (Del. Ch. 2004) ("The termination fee is well within the range of reasonableness; here

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[9] Plaintiffs further complain that Defendants breached their duties by refusing to provide CF with information regarding the rejection of it's December 2009 offer and by telling CF that Terra was not for sale. Defendants had no duty to give information to CF on why their offer was rejected, and for the reasons discussed earlier, Defendants did not breach any duty by telling CF that Terra was not for sale.

representing only 3.3% of MONY's total equity value, and only 2.4% of the total transaction value.").

Second, Plaintiffs claim that if CF had not paid the $123 million termination fee, it would have bid at least $123 more for Terra is based on magical thinking. Plaintiffs offer no explanation on how or why CF would have bid an additional $123 million for Terra, particularly in the absence of another competitive bid. In fact, Plaintiffs offer no explanation as to why CF would have even reached its ultimate offer of $47.40 in the absence of competition from Yara.

Plaintiffs complain that the Board violated its duties by entering into an agreement to negotiate exclusively with Yara. Plaintiffs's argument ignores the reality of the situation surrounding the Yara negotiations. Defendants could not conduct simultaneous negotiations with Yara and CF because Yara was unwilling to engage in a bidding war to acquire Terra. Not only had Yara stated its unwillingness to engage in a bidding war but, despite its interest in acquiring Terra in 2009 when CF was making public bids to acquire Terra, Yara did not make any public bids.

Nor have Plaintiffs alleged or come forward with any facts in support of their claim that the Board breached its duties by negotiating exclusively with Yara and agreeing to a no-shop provision. "[A] board can fulfill its duty to obtain the best transaction reasonably available by entering into a merger agreement with a single bidder, establishing a 'floor' for the transaction, and then testing the transaction with a post-agreement market check." *In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9, 19 (Del. Ch. 2004). In response to an argument that a board had breached its duties

by dealing with only one bidder at the time, the Delaware Supreme Court stated:

> "[T]here is no risk-free approach to selling a company, and dealing with one bidder at a time has its own advantages. Thus, the mere fact that the Pennaco board decided to focus on negotiating a favorable price with Marathon and not to seek out other bidders is not one that alone supports a breach of fiduciary duty claim.

In re Pennaco Energy, Inc. Shareholders Litig., 787 A.2d 691, 706 (Del. Ch. 2001). The court noted that the agreement left the single bidder "exposed to competition from rival bidders, with only the modest and reasonable advantages of a 3% termination fee and matching rights." *Id.* at 707.

At the hearing, Plaintiffs argued that Defendants failed to obtain maximum value for the shareholders because they caused CF to walk away from negotiations. In fact, CF did not stop pursuing Terra. To the contrary, although CF stated that it was abandoning its pursuit of Terra, it made a bid to acquire Terra in March of 2010 that was significantly higher than either the Yara bid or CF's previous bids. Furthermore, CF has entered into a merger agreement with Terra. As Defendants point out, this is not a case where CF came out of the woodwork after the Yara acquisition was complete and said that they *would* have paid more. CF *did* pay more, and the Terra directors acted diligently in responding to CF's offer.

The Yara termination fee, exclusivity and confidentiality agreements, and no shop provision were necessary elements of obtaining a Yara deal, which subsequently brought about an offer from CF that was more than $8 higher than CF's December 2009 offer. It is not within the Court's province to "second-guess"

the defendants decisions. *In re Toys "R" Us, Inc., S'holder Litig.*, 877 A.2d at 1000. In sum, Plaintiffs have failed to allege facts that show that defendants did not make "good faith efforts to maximize shareholder value." *Shenker*, 411 Md. at 336. The results achieved by the Board preclude such a claim. There is no factual basis for a claim that there was a better deal to be had from CF or anyone else, and there is nothing about the process that is evidence that the Board's actions were anything less than good faith efforts to maximize shareholder value.

Plaintiffs Have Not, and Cannot Allege a Breach of Fiduciary Duty Claim Against Terra.

Defendant Terra argues that a fiduciary duty claim can not be asserted against it as a matter of law because a corporation "is not a fiduciary of, and thus cannot owe a fiduciary duty to, its shareholders." *In re Dataproducts Corp. Shareholders Litig*, 1991 WL 165301 at *6 (Del. Ch. 1991).[10] Under Delaware corporate law, while directors owe fiduciary duties to the corporation and its shareholders, "a corporation owes no duty to its shareholders independently from its agents." *NRG Barriers, Inc. v. Jelin, et al.*, 1996 WL 451319 at *6 (Del. Ch. 1996). In their memoranda, Plaintiffs did not cite any authority to support their claim of a breach of fiduciary duty by Terra, and at the hearing, they conceded that there is no case supporting their position. Not swayed by the absence of any authority, Plaintiffs argued that the corporation was acting as an agent of the Board because the Board needed the company to take

[10] The Court of Appeals ordinarily accords proper "respect" to "Delaware decisions on corporate law." *Shenker*, 411 Md. at 338 note 14 (citation and internal quotation marks omitted).

actions without which the Yara transaction could not have occurred. They argue that Terra is liable because, at the behest of the Terra Board, and while imputed with the knowledge that the Terra Board was breaching it's fiduciary duties, Terra entered into the Merger Agreement. The argument does not hold water and the claim against Terra will be dismissed.

<u>The Count for Attorneys Fees Will Be Dismissed and Plaintiff May File a Motion for Attorneys' Fees.</u>

Defendants also seek to dismiss Plaintiffs' attorneys' fees claim on the grounds that Maryland law does not recognize a separate and standalone action for attorneys' fees in a case such as this. Plaintiffs concede that a standalone claim for attorneys' fees is not recognized and request an opportunity to file a motion for attorneys' fees to argue that Plaintiffs' lawsuit prompted Defendants to take action for the benefit of Terra shareholders. Therefore this count will also be dismissed, and Plaintiff will be given an opportunity to file a Motion for Attorneys' Fees. *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989) ("Once it is determined that action benefitting the corporation chronologically followed the filing of a meritorious suit, the burden is upon the corporation to demonstrate 'that the lawsuit did not in any way cause their action.'" (citation omitted)).

Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss, or for Summary Judgement will be granted, Plaintiffs' Motion for Partial Summary Judgment will be denied and the Court will issue a scheduling order for Plaintiffs to file a Motion for Attorneys' Fees.

Dated: July 14, 2010

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Judge Evelyn Omega Cannon